

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7559

76-7559

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL A. GRIPPE,

Plaintiff-Appellant,

v.

LOUIS J. FRANK, THE FORMER COMMISSIONER
OF POLICE OF THE COUNTY OF NASSAU, NEW
YORK, DANIEL P. GUIDO, THE SUCCESSOR AND
PRESENT COMMISSIONER OF THE POLICE
DEPARTMENT OF THE COUNTY OF NASSAU, AND
THE COUNTY OF NASSAU, NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF ON BEHALF OF APPELLANT
DANIEL A. GRIPPE

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- against -

LOUIS J. FRANK, THE FORMER COMMISSIONER
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YORK, DANIEL P. GUIDO, THE SUCCESSOR AND
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BRIEF ON BEHALF OF PLAINTIFF-
APPELLANT DANIEL A. GRIPPE

PRELIMINARY STATEMENT

This is an appeal by the appellant from an Order of the Honorable George C. Pratt, United States District Court Judge for the Eastern District of New York, filed on October 21, 1976 which granted the appellee's motion to dismiss the plaintiff-appellant's complaint. That the Order appealed from ruled that when the appellant raised the same constitutional issues, contending he was denied a fair administrative hearing, that he did not have the right to confront witnesses, that his

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Fifth Amendment privileges were violated, that his right to counsel was violated, that his right to privacy was violated, that his right to due process and equal protection were violated, in State Court's proceedings below, the appellant was barred from commencing a subsequent federal action based upon the same constitutional subjects pursuant to Federal Civil Rights Statutes on the grounds of res judicata and collateral estoppel. The Order appealed from further ruled that the Article 78 proceeding brought by the appellant in the State Courts to review the determination dismissing the appellant from his position as a police sergeant was in the nature of a declaratory judgment action, an injunction action or an action for monetary relief rather than a proceeding brought by way of review and certiorari as is provided for in Article 78 of the Civil Practice Law and Rules of the State of New York and is barred under the doctrine of res judicata for this reason.

STATEMENT OF FACTS

That on July 19, 1976 the plaintiff-appellant's complaint brought pursuant to Federal Civil Rights Statutes, was served and filed (*see p. A-7--A-35 where the complaint is reproduced). That the factual allegations of the complaint which outline the appellant's constitutional deprivations are

*A - refers to Appendix submitted together with this Brief.

summarized as follows: That the appellant was a member of his police Department for over fourteen years. That on September 12, 1973 he was ordered to report to Police Headquarters for questioning. Upon arrival there, the appellant requested the right to have an attorney present which was denied. Interrogation of him concerned an extra-marital off duty affair the appellant was alleged to be engaged in with an unmarried woman. Some of the questions were designed to interrogate the appellant concerning crimes he did not commit but most of the questions were designed to force the appellant to admit to having engaged in the alleged off duty affair. (Section 255.17 of the Penal Law of the State of New York defines adultery, a class B misdemeanor).

That the appellant answered all questions concerning his duties as a police officer but refused to answer questions concerning his private rights off duty which bore no relationship whatsoever to his official duties. The appellant again during the course of interrogation asked to have his attorney present which high ranking superior officers and interrogators refused to permit. The appellant was ordered to answer all questions or be charged with insubordination. Again the appellant said he would answer all questions relating to his

duties as a police officer but not any questions relating to his private life. Thereafter the second highest ranking uniformed police officer of the Department came into the interrogation room, cursed and shouted at the appellant and ordered him to answer all questions asked or be charged with insubordination and be immediately suspended. It was stated,

"Grippe, who the hell do you think you are, pulling this bullshit with me, . . . you answer these god damn questions right now or you will be charged with insubordination and be immediately suspended. . ."

The appellant thereafter wrote a coerced report where he pointed out in the first paragraph that he was being ordered to write about his personal and private life; that the appellant thought his constitutional rights were being violated and that he was being compelled to write the report.

That the appellant was also informed he would be charged with making a false statement because in his coerced report he wrote that he was being threatened with losing his job rather than being immediately suspended.

That shortly thereafter the appellant was formally charged with conduct unbecoming to an officer in that he had an off duty extra-marital affair and for making a false

communication. He was thereupon officially suspended.

That during the departmental hearing the coerced report was introduced into evidence over objection as well as the following so-called evidence over objection: The hearsay evidence of the scorned woman was brought out by conversations the police allegedly had with her. Upon cross-examination a high ranking police officer revealed that this woman admitted that she had lied, wished to recant and withdraw her complaint. This woman was never produced for confrontation and cross-examination. That during the departmental hearing the appellant produced two eminent sociologists who testified, that in their expert opinions the conduct allegedly engaged in did not involve moral turpitude; that it was not shocking to the conscience of the community.

That when the appellant was formally served with charges on September 13, 1973 he was informed by a high ranking police official that he should resign so as not to hurt his chances for future employment but that if he did not so resign he would be found guilty and dismissed which is what in fact took place and has taken place.

That the appellant's complaint, as well, details the entire history of the proceedings in the State Courts below.

The appellant concedes as is determined in the Order appealed from (A-2) that the appellant sought a review in the State Courts to annul the determination, dismissing the appellant from his position as a Nassau County Police Sergeant on constitutional grounds, namely, that the appellant was not allowed the right to confront the chief witness against him, Fifth Amendment privileges, etc., right to counsel, etc., right to privacy, etc., due process and equal protection of the law, etc., as well as upon the evidentiary basis that there otherwise was insufficient substantial evidence to sustain the administrative determination.

STATUTES INVOLVED

UNITED STATES STATUTES:

Title 28, United States Code,
§1331. Federal question; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Title 28, United States Code,
§1343. Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 28, United States Code,
§2201, Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any

such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28, United States Code,
§2202. Further relief

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Title 42, United States Code,
§1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

NEW YORK STATUTES:

Article 1, Civil Practice Law and Rules
§103. Form of civil judicial proceedings.

"(c) Improper form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

Article 30, Civil Practice Law and Rules
§3001. Declaratory judgment.

"The supreme court may render a declaratory

judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

Article 30, Civil Practice Law and Rules
§3017. Demand for relief.

"(b) Declaratory judgment. In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed."

Article 78, Civil Practice Law and Rules
§7801. Nature of proceeding.

"Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. . ."

Article 78, Civil Practice Law and Rules
§7803. Questions raised.

"The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and

capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

.. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

Penal Law, §255.17. Adultery.-

"A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse.

Adultery is a class B misdemeanor."

QUESTIONS PRESENTED

1. Whether the Article 78 proceeding brought by the appellant in the State Courts below to review the administrative determination dismissing him from his position as a police sergeant and to annul said determination was in fact and in law a proceeding in the State Courts in the nature of an action for declaratory judgment, injunctive and monetary damages as was determined in the Order appealed from which Order barred the appellant from raising the issues in Federal Court, supposedly raised by the appellant in the alleged declaratory action below, in accordance with federal standards and case law?

2. Whether an administrative determination which

resulted in appellant's discharge as a Nassau County Police Sergeant, which denied the plaintiff-appellant the most fundamental elements, to wit: the right to confront the accuser who wished to recant her hearsay testimony, the right of the appellant to exercise his Fifth Amendment privileges (even though a police officer when confronted and interrogated as to alleged criminal conduct not related to his duties), the right to have counsel present, the right to privacy, the right to due process and equal protection of the law all of which constitutional deprivations were raised by the appellant in the State Courts below by means of an Article 78 proceeding, where the State Courts have affirmed the administrative determination without opinion, prohibited and estopped the appellant from commencing a subsequent Federal Court action pursuant to the Civil Rights Statutes of the United States Code and other federal statutes based upon the appellant's deprivation of the foregoing constitutional rights of the appellant and whether the dismissal of appellant's complaint brought pursuant to the foregoing Federal Statutes as determined by the Order appealed from is justified under the doctrine of res judicata and collateral estoppel?

POINT I

THAT THE ARTICLE 78 PROCEEDING IN THE
STATE COURTS BELOW WAS NOT IN THE
NATURE OF A DECLARATORY JUDGMENT OR
AN ACTION FOR AN INJUNCTION; THAT IT
WAS NOT TREATED AS SUCH BY THE STATE
COURTS BELOW; THAT THE ORDER OF THE
COURT APPEALED FROM WAS IN ERROR IN SO
HOLDING AND DETERMINING; TO THE CONTRARY,
THE ARTICLE 78 PROCEEDING BELOW WAS
BROUGHT SPECIFICALLY PURSUANT TO STATE
STATUTE BY WAY OF REVIEW AND CERTIORARI
TO ANNUL THE ADMINISTRATIVE DETERMINATION.

The Order appealed from (A-2) relying upon a paragraph of a decision of this Court in Lombard v. Board of Education of the City of New York, 502 F.2d 631, 636 (1974) ruled that the plaintiff,

"seeking declaratory, injunctive,
and monetary relief, plaintiff
instituted in the New York State
Supreme Court, an Article 78
proceeding. . ."

That in this connection this Court's attention is respectfully referred to the verified Article 78 petition which is attached as exhibit C to the complaint in this Federal action (A-36) wherein it is clearly demonstrated that the appellant in the State Courts employed the Article 78 procedure as he is required to do in order to review a determination of an administrative agency. (See Article 78 of the Civil Practice Law and Rules of the State of New York; cf, Section 103 of

the Civil Practice Law and Rules where under certain circumstances an Article 78 proceeding can be treated or converted into a declaratory action, page 8 of this Brief). As was stated in this Court in Lombard, (supra at page 637) and as was quoted by Judge Pratt in part, (A-3):

"where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding * * *, the litigant has made his choice and may not have two bites at the cherry."

The complete line of this paragraph in Lombard following the astericks above goes on to read,

"by treating it as an action for a declaratory judgment. . ."

This paragraph of the Lombard decision also cites Matter of Kovarsky v. Housing & Development Administration, 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972). This State case discusses the doctrine that an Article 78 proceeding is not ordinarily the proper form for attacking the constitutionality of a statute but goes on to state that since all necessary parties are before the court pursuant to CPLR 103(c), the 78 proceeding should have been treated as an action for declaratory judgment,

"seeking to test the constitutionality of the R.S.L." (Rent Stabilization Law), Matter of Kovarsky v. Housing & Development Administration, supra 192.

A reading of the Thistlethwaite v. City of New York case also cited in this paragraph in Lombard and referred to in Judge Pratt's Order (A-3), was likewise a declaratory judgment action which sought to declare a park ordinance unconstitutional.

It is respectfully submitted that the doctrine of res judicata or collateral estoppel which is referred to in the paragraph of Lombard heretofore referred to and the New York cases cited therein, is specifically limited to state declaratory judgment (or an Article 78 proceeding converted to one) actions which seek to declare some statute, rule or ordinance invalid on constitutional grounds. The appellant in bringing his Article 78 proceeding in the State Courts did not seek to declare any statute, rule or ordinance invalid; he rather invoked the provisions of an Article 78 proceeding to review the administrative determination dismissing him and to annul it upon the grounds that there was not substantial evidence to sustain it as well as upon all the constitutional grounds heretofore noted. The appellant in the State Court proceedings relied and now relies upon the Constitution of the United States of America, the Constitution of the State of New York, the applicable provisions of the Article 78 statute, the Administrative Law of Nassau County and the Rules and Regulations of the Police Commissioner of the County of Nassau,

he did not urge at any time that they were unconstitutional.

It is respectfully submitted that the Federal doctrine barring relitigation in Federal Courts on the grounds of res judicata or collateral estoppel of State declaratory judgment action which seek to declare some statute, rule or ordinance invalid on constitutional grounds has absolutely no application whatsoever to the action in this Court and the complaint should not have been dismissed upon this basis.

POINT II

THAT THE PROCEEDING IN THE STATE COURTS
BELOW IN THE NATURE OF AN ARTICLE 78
PROCEEDING TO REVIEW AND ANNUL THE
ADMINISTRATIVE DETERMINATION ON CON-
STITUTIONAL GROUNDS AND THE AFFIRMATION
OF THE STATE COURT'S "WITHOUT OPINION"
OF THE APPELLANT'S DISMISSAL DO NOT ESTOP
OR PROHIBIT THE APPELLANT FROM COMMENCING
A SUBSEQUENT FEDERAL ACTION BASED UPON THE
DEPRIVATION OF THE CONSTITUTIONAL RIGHTS
SECURED TO THE APPELLANT AND VIOLATED UNDER
COLOR OF STATE LAW; THE ORDER APPEALED
FROM SHOULD NOT HAVE DISMISSED THE COMPLAINT
UNDER THE DOCTRINE OF RES JUDICATA OR
COLLATERAL ESTOPPEL; THAT THE APPELLANT'S
CONSTITUTIONAL RIGHTS WERE GROSSLY VIOLATED
UNDER COLOR OF STATE LAW BEFORE AND DURING
AN ADMINISTRATIVE HEARING AND BY THE STATE
COURTS AND ITS JUDICIARY IN AFFIRMING THE
ADMINISTRATIVE DETERMINATION, IN THAT:
APPELLANT WAS DENIED THE FUNDAMENTAL RIGHT
TO A FAIR HEARING, THE RIGHT TO CONFRONT
HIS ONLY ACCUSER WHO WISHED TO RECANT, WHO
ADMITTED SHE HAD LIED, TO HAVE COUNSEL PRESENT
WHEN INTERROGATED RE: A CRIMINAL CHARGE OR
CHARGES, TO BE SECURE IN THE RIGHT OF PRIVACY

WHEN POLICE OFFICIALS SEEK TO COMPEL HIM TO
TESTIFY ABOUT OFF DUTY ACTIVITIES WHICH ARE
TOTALLY UNRELATED TO HIS DUTIES AS A POLICEMAN,
TO APPROPRIATELY INVOKE HIS FIFTH AMENDMENT
PRIVILEGES, TO BE ALLOWED DUE PROCESS AND EQUAL
PROTECTION OF THE LAW, ALL OF WHICH CONSTITUTE
GROSS CIVIL RIGHTS DEPRIVATIONS AND ARE PROPER
SUBJECTS OF THE APPELLANT'S CAUSE OF ACTION
SET FORTH IN HIS DISMISSED COMPLAINT.

The Order appealed from pointed out that the appellant either in his petition or in his brief or in both in the state courts below asserted the same constitutional claims which he now urges for the basis of this Sec. 1983, USC action (A-2). The court below then again cited as a bar the authority of Lombard and Thistlethwaite cases (A-4).

It is respectfully submitted that the Lombard decision of this appellate court does not in any way stand for the proposition that if a litigant has been deprived of his constitutional rights in a state be it by means of an administrative or judicial action such deprivation of appellant's constitutional rights, although raised in the state courts below, and ruled upon by the state courts below, preclude the federal relief sought in the dismissed complaint.

Relief for the violation of appellant's civil rights as expressed in a federal civil rights complaint are never barred under the doctrine of res judicata or collateral estoppel, provided they are proven after trial, and a careful reading of this court's decision in Lombard clearly announces that this is the law.

As to collateral estoppel, page 637 in Lombard, Paragraph 3, this court holds, "In addition, for the doctrine of issue preclusion to be applicable, the determination of the issue must have been necessary to the decision. Restatement (Second) of Judgments Section 68h (Tent. Draft No. 1, 1973); Halpern v. Schwartz, 426 F. 2d 102 (2d Cir. 1970)." The appellees urged in the state courts that they may have had sufficient substantial evidence separate and apart from any claims of constitutional deprivations to justify the upholding of the administrative determination. Accordingly, the constitutional deprivations of the appellant may not have ever been considered by the courts below. An affirmation "without opinion" is necessarily silent as to the basis upon which the administrative determination was sustained.

As to claim preclusion, more fundamentally in Lombard this court, at Page 635 thereof, comments that the civil rights act was authoritatively interpreted in Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961) wherein it is stated, "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (Emphasis supplied). If this language, as interpreted by this court in Lombard, is to have any meaning, the appellant has the right in the case at bar, first, to seek redress in the state courts from the determination dismissing him as a Sergeant in the

Nassau County Police on the ground of deprivation of his constitutional rights which were thereafter refused on the so-called merits, but without opinion, before seeking Federal relief; otherwise, the language of Monroe v. Pape, as just cited in Lombard would have no meaning and significance whatsoever. Relief also sought by way of review and not by way of declaratory judgment in the State Courts below for argument's sake, regardless of what evidence there was against Grippe in the hearing below, was so unconstitutionally unfair and the fundamental due process concepts and principles so violated that it must be annuled. Accordingly, it is respectfully submitted that this remedy being supplementary and the state remedy being wholly inadequate the complaint states a cause of action under the Federal Statutes invoked.

In Lombard again at page 635, the final paragraph, this Court goes on to consider that if in the state action for purposes of claim preclusion (res judicata) a plaintiff in the State Court wishes to raise a state statutory construction or a state constitutional issue should probably be required to raise it in the first instance in the State Courts before raising it in a Federal District Court in the first instance. Again, it is respectfully pointed out to this Court that the

appellant did not seek any state statutory construction or any statutory construction on constitutional grounds. Even so, this Court in Lombard went on to say at page 636,

"We are better off not to compel the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court."
(Emphasis supplied).

It is respectfully submitted that in accordance with the doctrine enunciated by this Court in Lombard you cannot now penalize the plaintiff-appellant for seeking or at least trying to seek constitutional redress in a State Court for the deprivation of the most fundamental rights to a fair hearing and to adopt such a construction would destroy the meaning and purpose of the Civil Rights Act as interpreted by Monroe v. Pape, supra. As stated in Mitchum v. Foster, 407 U.S. 225, 32 L.Ed 2d 705, 92 S Ct 2151,

"The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial. Ex parte Virginia, 100 US, at 346, 25 L. Ed at 679". (Emphasis supplied).

The Article 78 proceeding brought in the Lombard case was essentially the same as the Article 78 proceeding brought by the appellant in the State Court below except

appellant, in the State Court below certainly did raise issues involving the deprivation of his constitutional rights. If this Court were to now hold contrary to its well reasoned interpretation of the Civil Rights Act as found in Lombard, that simply because a person has raised due process arguments and deprivation and constitutional rights in State Courts below and the State Courts have decided adversely against him, he has no Federal remedy, then it is respectfully submitted that this Court is taking a turn back in the pages of judicial history which it should not do even if there were not any specific Federal Civil Rights Act or statutes. The question before this Court is whether or not the appellant has a remedy and not whether or not he can prove his cause of action. The State Courts did nothing to redress the deprivation of the appellant's right to the most elementary type of a fair hearing. Assuming that the State Courts below did so on the basis that there was other untainted or independent evidence to justify the dismissal, this still does not prohibit this action as the determination of the violation of the appellant's constitutional rights was not necessary to the upholding, without opinion, of the administrative determination of the defendant Police Commissioner dismissing the appellant from his position as a police Sergeant.

The United States Supreme Court in McNeese v.
Board of Education, 373 US 668, 10 L Ed. 2d 622, concerning
Section 1983 said:

". . .The purposes were several fold -
to override certain kinds of state laws,
to provide a remedy where state law was
inadequate, 'to provide a federal remedy,
where the state remedy, through adequate
in theory, was not available in practice',
and to provide a remedy in the federal
courts supplementary to any remedy any
State might have."

CONCLUSION

THE ORDER APPEALED FROM WHICH GRANTED
THE APPELLEES' MOTION DISMISSING THE
COMPLAINT ON THE BASIS OF RES JUDICATA
AND COLLATERAL ESTOPPEL SHOULD IN ALL
RESPECTS BE REVERSED AND THIS ACTION
REMANDED TO THE UNITED STATES DISTRICT
COURT FOR FURTHER PROCEEDINGS AND TRIAL,
TOGETHER WITH SUCH OTHER, FURTHER AND
DIFFERENT RELIEF AS THIS COURT MAY DEEM
JUST AND PROPER.

Respectfully submitted,

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1-4-77

Plaintiff-Appellant,

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v.

Defendants-Appellees.

Angelina Moneta
ANGELINA MONETA

LINDA SUE COLYER
NOTARY PUBLIC, State of New York
No. 30-46182-17
Qualified in Nassau County
Commission Expires March 30, 1977

Linda Sue Colyer

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NASSAU COUNTY, N.Y.

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3rd DAY OF January 12 77
JOHN F. O'SHAUGHNESSY
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